No. 09-774

In the Supreme Court of the United States

DEJAN KOSTIC, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly denied the petition for review when it held that record evidence failed to compel reversal of the adverse credibility determination, even though it rejected certain aspects of that credibility determination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B17) is not published in the Federal Reporter but is available at 340 Fed. Appx. 249. The decisions of the Board of Immigration Appeals (Pet. App. C1-C4) and the immigration judge (Pet. App. D1-D22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2009. A petition for rehearing was denied on September 24, 2009 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on December 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security or the Attorney General may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

An applicant for asylum bears the burden of demonstrating that he is eligible for that form of relief. 8 U.S.C. 1158(b)(1)(B)(i). Under the Attorney General's regulations, an alien who has demonstrated that he has suffered past persecution "shall also be presumed to have a well-founded fear of persecution." 8 C.F.R. 1208.13(b)(1). That presumption may be rebutted, however, if an immigration judge (IJ) makes certain specified findings. As pertinent here, the regulations provide that the presumption of a well-founded fear of future persecution that arises when an alien demonstrates that he has been subject to past persecution is rebutted if the government establishes by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances" in the alien's country of origin "such that the applicant no longer has a well-founded fear of persecution." 8 C.F.R. 1208.13(b)(1)(i)(A); see 8 C.F.R. 1208.13(b)(1)(ii).

The Attorney General's regulations also provide that there are limited circumstances in which an IJ may nonetheless grant asylum where an alien has demonstrated past persecution but the government has suc-

ceeded in rebutting the presumption of a well-founded fear of future persecution that arises from that showing. Subject to certain exceptions not at issue here, the regulations state that an IJ has "discretion" to grant asylum in those circumstances if:

> (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to [his or her] country [of nationality] arising out of the severity of the past persecution; or
>
> (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

8 C.F.R. 1208.13(b)(1)(iii)(A) and (B); see *In re D-I-M*, 24 I. & N. Dec. 448, 450 (B.I.A. 2008).

2. Petitioner is a native of the former Yugoslavia and a citizen of Serbia. Pet. App. B1-B2. He arrived in the United States on a nonimmigrant student visa in November 1994, and he filed an application for asylum and withholding of removal within two months of his arrival. *Id.* at B2-B3, D2. In March 1995, petitioner filed a second application for asylum and withholding of removal with additional documentation. *Id.* at B3. His principal claim was that he feared he would be persecuted upon his return to Serbia on account of his political opinion (specifically, his membership in the Serbian Renewal Movement), and he attached written statements to his applications to that effect. *Ibid.*

In June 2004, the Department of Homeland Security referred petitioner's asylum application to an IJ and at the same time initiated removal proceedings against him for remaining in the United States beyond the temporary period for which he had been admitted. Pet. App. B5-B6. On June 22, 2006, following a hearing on peti-

tioner's asylum application, the IJ denied petitioner's asylum application and ordered him removed from the United States. *Id.* at D22. The IJ found that petitioner was not credible, citing "inconsistencies, not only in the testimony in this case, but also in the documentary evidence which has been submitted." *Id.* at D13. Further, even assuming that petitioner was credible, the IJ further found that the government had successfully shown that changed circumstances in Serbia undermined any well-founded fear of persecution upon petitioner's return. *Id.* at D18.

On May 7, 2008, the Board of Immigration Appeals (Board) dismissed petitioner's appeal of the IJ's decision. Pet. App. C1-C4. The Board found no clear error in the IJ's adverse credibility determination in light of the inconsistencies between petitioner's testimony, his asylum applications, and his documentary submissions. *Id.* at C3. The Board also found that even if petitioner had been credible, he nevertheless failed to corroborate his claim of past persecution. *Ibid.* Finally, the Board determined that, even if past persecution had been established, country conditions had changed sufficiently such that petitioner no longer had an objectively reasonable fear of future persecution, and was thus ineligible for either asylum or withholding of removal. *Id.* at C4.

3. Petitioner filed a petition for review in the Sixth Circuit. On July 8, 2009, the court of appeals denied the petition for review. Pet. App. B1-B17. Although the court of appeals found that "several of the [IJ's] cited inconsistencies lack support in the record," *id.* at B12, the court of appeals concluded that one "fatal flaw" constituted substantial evidence supporting the IJ's adverse credibility determination. *Id.* at B13. Specifically, the court noted that petitioner gave three different accounts

of his alleged detention by secret Communist police in March 1991: in his written statement accompanying his asylum application, he stated that he was detained overnight; a document submitted as evidence of his membership in an anti-Communist political party stated that he was detained for nearly two weeks; and he testified at the asylum hearing that he was detained for three days. *Id.* at B13-B14. These discrepancies regarding the length of petitioner's detention, the court of appeals held, "go to the heart of his claim that he was persecuted." *Id.* at B14-B15 (internal quotation marks and citation omitted). Accordingly, the court held that nothing in the record compelled reversal of the agency's adverse credibility determination. *Id.* at B15. Moreover, the court of appeals agreed with the Board and the IJ that even if petitioner had proven past persecution, the government had "rebutted the presumption of a well-founded fear by showing that country conditions have changed dramatically." *Id.* at B17. Accordingly, the court denied the petition for review. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-12) that the court of appeals erred by failing to remand his case back to the agency to consider whether it would have made the same adverse credibility determination in light of the inconsistencies that the court of appeals found lacked support in the record. That claim does not warrant further review because the unpublished decision of the court of appeals denying the petition for review is correct and does not conflict with any decision of this Court or any other court of appeals.

1. Petitioner contends (Pet. 8-12) that the court of appeals' decision conflicts with a prior Sixth Circuit

opinion as well as a number of decisions from other courts of appeals. Specifically, petitioner contends that the court of appeals' decision violates the "ordinary remand rule," as applied by this Court in *INS* v. *Ventura*, 537 U.S. 12 (2002) (per curiam), and *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam), and embodied in several other court of appeals decisions.

Petitioner is wrong. The "ordinary remand" rule as applied in *Ventura* and *Thomas* concerned issues that the Board had not even considered in the first instance. See *Ventura*, 537 U.S. at 17 ("The BIA has not yet considered the 'changed circumstances' issue."); *Thomas*, 547 U.S. at 186 ("The agency has not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group.'"). Here, the Board fully considered the IJ's adverse credibility determination and affirmed it. That the court of appeals disagreed with certain aspects of that adverse credibility determination does not render petitioner's credibility an entirely new issue that the Board must consider in the first instance. The decision below accordingly does not conflict with *Ventura* or *Thomas*.

Nor does the decision below conflict with any of the prior decisions of the Sixth and other circuits cited by petitioner (Pet. 10-12). As an initial matter, this Court does not exercise certiorari jurisdiction to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no such conflict. In *Koulibaly* v. *Mukasey*, 541 F.3d 613 (2008), the Sixth Circuit remanded the case back to the agency only after concluding that the adverse credibility determination was not supported by substantial evidence. *Id.* at 624. The court did not indicate that the agency should reconsider its adverse credibility deter-

mination on remand; rather, the remand was to allow the agency to further evaluate the alien's eligibility for asylum *absent* the adverse credibility determination. *Ibid.* Similarly, in many of the decisions of other courts of appeals petitioner cites in support of an alleged conflict, the courts remanded to the agency for further consideration of the alien's asylum claim only after concluding that the record in the case compelled reversal of the agency's adverse credibility determination. See *Kueviakoe* v. *United States Att'y Gen.*, 567 F.3d 1301, 1306 (11th Cir. 2009); *Singh* v. *Gonzales*, 439 F.3d 1100, 1113 (9th Cir. 2006); *Butt* v. *Gonzales*, 429 F.3d 430, 438 (3d Cir. 2005).

Finally, contrary to petitioner's argument (Pet. 10-12), the court of appeals' decision does not conflict with the reasoning of *Kadia* v. *Gonzales*, 501 F.3d 817 (7th Cir. 2007), or *Li* v. *INS*, 453 F.3d 129 (2d Cir. 2006). In each of those cases, the court of appeals found serious errors in the reasoning behind the agency's adverse credibility determination, but also agreed that there were some inconsistencies in the alien's testimony. In each case, the agency's errors greatly outweighed the actual inconsistencies in number or in significance. See *Kadia*, 501 F.3d at 821 ("The immigration judge failed to distinguish between material lies, on the one hand, and innocent mistakes, trivial inconsistencies, and harmless exaggerations, on the other hand."); *Li*, 453 F.3d at 141 (noting that "there [was] little besides error in the IJ's decision" and that "no other aspect [but one] of his credibility finding is entirely beyond reproach"). Nevertheless, in recognition of the broad deference extended to the agency's factual findings, which might allow it to make an adverse credibility determination on the basis of the actual inconsistencies, the courts of appeals re-

manded for a renewed credibility determination. See *Kadia*, 501 F.3d at 821-824; *Li*, 453 F.3d at 136-137, 141-142.

On the other hand, the court of appeals in this case recognized that the "one fatal flaw" in petitioner's case served to sustain the IJ's and the Board's adverse credibility determination. Pet. App. B13. Because the court recognized that the significant discrepancies "regarding the length of [petitioner's] detention 'go to the heart of' his claim that he was persecuted by the police," *id.* at B14-B15, it affirmed the agency's adverse credibility determination because it was supported by substantial evidence, *id.* at B15. See also *Hamida* v. *Gonzales*, 478 F.3d 734, 738, 740 (6th Cir. 2007); *Li* v. *Ashcroft*, 378 F.3d 959, 964 (9th Cir. 2004). Petitioner has identified no case in which a court of appeals, despite agreeing with a principal inconsistency going to the heart of an alien's asylum claim, nevertheless felt constrained to remand back to the agency in light of its disagreement with other, more minor inconsistencies. Moreover, where, as here, a court of appeals does not announce or apply a rule of general applicability, a court's decision addressing whether the findings of fact in a decision of an IJ or the Board are supported by substantial evidence—including the specific findings of fact about whether the alien's testimony is credible—is fact-bound. The court of appeals' decision therefore does not give rise to any conflict that would justify exercise of this Court's certiorari jurisdiction.

2. Even if petitioner were correct that the court of appeals should have remanded the case after noting that some of the inconsistencies identified by the IJ lacked support in the record, this case would still not warrant this Court's review for a number of reasons. First, the

court of appeals' decision is unpublished and does not bind subsequent panels of the Sixth Circuit. See 6th Cir. R. 206(c). Second, petitioner's argument essentially amounts to a challenge to the court of appeals' application of a properly stated rule of law, which does not ordinarily justify exercise of this Court's certiorari jurisdiction. See Sup. Ct. R. 10.

Finally, even assuming the erroneous aspects of the agency's finding required a remand to make a new credibility determination, petitioner still would not be entitled to relief. As noted above, a proper showing of past persecution gives rise to a presumption of a well-founded fear of future persecution, but the government may rebut that presumption by showing a "fundamental change in circumstances" in the alien's country of origin that negates any fear of future persecution. See 8 C.F.R. 1208.13(b)(1)(i)(A). In this case, the IJ found that changed conditions in Serbia—specifically, the fact that Slobodan Milosevic is no longer in power and the government has changed significantly—undermined petitioner's fear of future persecution, Pet. App. D18-D19, and the Board agreed, *id.* at C4. The court of appeals affirmed that determination, *id.* at B16-B17, and petitioner does not renew his challenge to that determination in this Court. Accordingly, because the denial of petitioner's asylum application, and the court of appeals' affirmance of that denial, both rest on an alternative, unchallenged ground, this case does not warrant this Court's review.

3. Petitioner contends (Pet. 12-14) for the first time in this Court that the court of appeals should have remanded so that the agency could adjudicate a claim for "humanitarian asylum" under 8 C.F.R. 1208.13(b)(1)(iii)(B). This Court generally will not re-

view claims that were neither pressed nor passed upon below. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). More fundamentally, because petitioner did not make this claim to the Board, the court of appeals and this Court have no power to review it. See 8 U.S.C. 1252(d)(1). Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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